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FMC Agreement No. 201112-002

**LEASE AND OPERATING AGREEMENT**

**Between**

**PHILADELPHIA REGIONAL PORT AUTHORITY, Landlord,**

**And**

**KINDER MORGAN LIQUIDS TERMINALS LLC, Tenant,**

**For**

**Berth#1 And Berth #2  
Tioga Marine Terminal II  
Philadelphia, Pennsylvania**



## **LEASE AND OPERATING AGREEMENT**

**THIS LEASE AND OPERATING AGREEMENT** (this “Agreement” or this “Lease”) is made this 1st day of January 1, 2010 by and between **PHILADELPHIA REGIONAL PORT AUTHORITY** (“Landlord”), a body corporate and politic and an independent agency of the Commonwealth of Pennsylvania with offices at 3460 N. Delaware Avenue, Philadelphia, Pennsylvania 19134 and **KINDER MORGAN LIQUIDS TERMINALS LLC** (“Tenant”), a corporation incorporated under the laws of Delaware, with its principal place of business at 3300 North Delaware Avenue, Philadelphia, Pennsylvania 19134.

### **WITNESSETH:**

**WHEREAS**, by that certain deed dated July 26, 1990, the City of Philadelphia, Pennsylvania (the “City”) conveyed to Landlord all of the City’s right, title and interest in and to certain port facilities; and

**WHEREAS**, Landlord is authorized to make and execute contracts and other instruments necessary or convenient for the conduct of its business;

**WHEREAS**, Landlord wishes to lease to Tenant for the permitted maritime use, specified in Section 1.41, infra, and Tenant wishes to lease from Landlord for such maritime-related use, all that certain real estate and related improvements commonly known as Berth #1 (“Berth #1”) and Berth #2 (“Berth #2”) at Tioga Marine Terminal II in Philadelphia, Pennsylvania, as shown on Exhibit “A”, attached hereto and made part hereof (Berth #1 and Berth #2 being herein jointly referred to as the (“Premises”); and

**WHEREAS**, the Premises are now occupied by Tenant pursuant to that certain Lease Agreement dated July 14, 1975 between Philadelphia Port Corporation (Landlord’s predecessor in interest) and DRT Industries, Inc. (Tenant’s predecessor in interest), which Lease Agreement

(a) was assigned by DRT Industries, Inc. to Unitank Terminal Service, which in turn assigned same to Tenant, (b) was assigned by Philadelphia Port Corporation to Landlord, and (c) was amended by certain amendments dated January 22, 1979. January 1, 1986. October 28, 1988. March 5, 1990 and January 19, 1995 (as so amended, the ("Prior Agreement")).

**WHEREAS**, Tenant owns and operates a bulk liquid storage facility located at Delaware and Allegheny Avenues in Philadelphia Pennsylvania (the "Tenant's Facility"), which is a privately contracted bulk liquid storage facility with right of access to and storage therein subject solely to the execution of contracts or warehouse agreements between Tenant and its customers, and in no event is the Tenant's Facility deemed to be a public warehouse.

**NOW THEREFORE**, in consideration of the mutual covenants herein contained and intending to be legally bound, the parties hereby agree as follows:

## **ARTICLE 1 APPOINTMENT**

### **1.1 Grant.**

1.1.1 Subject to section 1.5 hereof, Landlord hereby leases the Premises to Tenant and Tenant hereby leases the Premises from Landlord for the Term (hereinafter defined) and subject to the conditions set forth in this Agreement. Notwithstanding anything to the contrary elsewhere contained in this Agreement, the Premises does not include that certain portion of the corner of the pier shown cross-hatched and labeled "Area Reserved for Common Usage (Mooring Purposes:) on Exhibit "A".

1.1.2 Landlord hereby also grants to Tenant the nonexclusive license, in common with others, to use during the Term that certain additional portion of Landlord's property adjacent to the Premises shown cross-hatched and labeled "Common Area" on Exhibit "A" (the "Common Area"), solely for vehicular and pedestrian ingress, egress and access to and

from the Premises and the Tenant's Facility. Subject to the prior written consent of Landlord, which Landlord shall not unreasonably withhold, Tenant may utilize the Common Area for the operation, installation, replacement and maintenance of pipelines, conduits and appurtenant facilities necessary for the operation of the Premises and the Tenant's Facility, without obstructing or interrupting the normal use of the Common Area by others. Tenant's use of the Common Area shall at all times be in conformity with Tenant's covenants and obligations contained in this Agreement.

1.1.3 During the Term, Tenant shall have the right, privilege and easement of operating, maintaining and replacing, at Tenant's expense, (a) the bulk liquid pipelines currently located under the building labeled "Transit Shed" on Berth #2 and (b) the lights presently erected on the Transit Shed roof, which illuminate the apron of Berth #2, with reasonable right of access thereto. Tenant's access to the Transit Shed for purposes of repairing, maintaining or replacing the pipelines and lights referenced in the preceding sentence, and all work to be undertaken by Tenant or its contractors in connection therewith, other than customary and routine maintenance or emergency repairs and replacements, shall be subject to Landlord's prior written consent, which Landlord agrees not to unreasonably withhold.

1.2 Quality of Service. Tenant covenants to operate and use the Premises at all times in a competent and efficient manner and to provide satisfactory service to Tenant's customers. Subject to Tenant's approval of the marketing material both Landlord and Tenant shall actively and diligently market the services provided by Tenant at the Tenant's Facility to third parties; provided however, that Landlord shall also market the services provided by tenants occupying other piers and facilities in the Port of Philadelphia and shall be under no obligation to favor the Tenant's Facility above other berths, piers and facilities in its marketing efforts. Landlord shall

refer to Tenant inquiries from third parties relating to bulk liquid storage. Landlord shall include a description of Tenant's operation and Tenant's name in the brochures used by Landlord.

1.3 Independent Contractor. Tenant shall be an independent contractor in the performance of its obligations under this Agreement. Any employees of Tenant hired to perform warehousing services or other activities at the Premises or the Tenant's Facility shall be the employees of the Tenant solely, and Landlord shall not be a joint employer of any of Tenant's employees. In addition, any employees of any company contracted by Tenant to perform any services shall be the employees of such company solely, and Landlord shall not be a joint employer of any such employees. To that end, Tenant and any company contracted by Tenant shall have the exclusive right to supervise and direct the day-to-day activities of all persons who perform services for them and they shall have sole responsibility with respect to such persons, including without limitation the responsibility to determine and pay their wages and any benefits to fulfill all applicable requirements under any collective bargaining agreements and to pay all federal, state and local taxes or contributions imposed or required under unemployment, worker's compensation, social security, wage and income tax laws with respect to them. There shall be no direct or indirect participation by Landlord in any employee relations matters concerning those persons employed by or through Tenant.

1.4 Use of the Premises.

1.4.1 Tenant shall use the Premises only for activities directly relating to the shipping or receiving of liquid bulk cargo including, without limitation, the loading, discharge, transfer and storage of product in waterborne commerce to and from Tenant's Facility (the "Permitted Use"). Tenant shall not use the Premises for any purpose other than the Permitted Use without the prior written consent of Landlord, which Landlord may grant or withhold in its

sole discretion. As used in this Agreement the term “product” means material of every kind and nature which arrives upon or departs from the Premises in connection with Tenant’s operation of the Premises specifically excluding (a) any product which arrives at or departs from the Premises in connection with a third party’s use of Berth #1 pursuant to Section 1.5 hereof, and (b) the slops oily waste cumene wash water, water generated from flushing of pipes and any other waste products generated as a result of compliance with Marpol. Without limiting the generality of the foregoing “product” includes all materials moved over the Premises to or from Tenant’s Facility to from or by vessel.

1.4.2 Tenant shall not use or permit the Premises to be used in whole or in part during the Term of this Agreement for any purpose or for any use in violation of and shall operate the Premises in compliance with any and all present or future laws, ordinances, general rules or regulations of any public or government authority at any time applicable thereto (collectively “Laws”) including without limitation the Laws of Commonwealth of Pennsylvania (the “Commonwealth”) and the City relating to by way of example only and not limitation sanitation or the public health safety or welfare or navigation and use of the port and port facilities.

1.4.3 Other than dredging permits for dredging of Berth #2, if any governmental license permit or approval shall be required for the proper and lawful conduct of Tenant’s business in or upon the Premises and Common Area (including without limitation any permit required for maintenance, repair or replacement of facilities utilized in the operation of the Premises), then Tenant at its sole expense shall duly procure and thereafter continuously maintain such license permit or approval in full force and effect during the period that it is required to be maintained and shall submit a copy thereof to Landlord for inspection or approval

but in no event shall Tenant's failure to procure or maintain same relieve Tenant from its obligations under this Agreement.

1.5 Landlord's Rights to Berth #1. Notwithstanding anything to the contrary elsewhere contained in this Article 1. Landlord reserves the right at all times during the Term without payment to Tenant and without abatement of Base Rent or other sums owing under this Lease to permit the vessels of third parties to dock at Berth #1 when Tenant does not have a vessel docked at Berth #1 on the terms and subject to the conditions herein set forth. Landlord shall give Tenant at least seventy-two (72) hours advance written notice of Landlord's intended use of Berth #1 stating the dates on which the third party vessel is scheduled to arrive at and depart from Berth #1. Provided that the intended use will not conflict with the docking at Berth #1 of a vessel previously scheduled by Tenant, Landlord may proceed to allow the third party vessel to dock at Berth #1. If Tenant has previously scheduled a vessel to dock at Berth #1 on dates which conflict with those set forth in Landlord's notice, Tenant shall so inform Landlord by written notice delivered to Landlord within one (1) business day following receipt of Landlord's notice of the intended use specifying the identity of Tenant's scheduled vessel and the dates on which it is scheduled to dock at Berth #1. Upon Landlord's use of Berth #1 for the docking of a third party vessel pursuant to this Section, Landlord shall be responsible for (a) moving or adequately protecting as Landlord elects the lower manifold at Berth #1 prior to the docking of such third party vessel and (b) moving the lower manifold back or removing any protective covering as the case may be upon the departure of such vessel at Landlord's sole expense.

1.6 Indemnification of Tenant for Beth #1 Use. In connection with Landlord's granting permission to third parties to dock at Berth #1 pursuant to Section 1.5 above Landlord

agrees to obtain from each such third party an agreement in commercially reasonable form pursuant to which such third party agrees to indemnify Tenant from and against (a) any damage to Berth #1 caused by the negligence or willful misconduct of such third party and (b) any damage or injury caused to Tenant's property by the negligence or willful misconduct of such third party while using Berth #1. Each such agreement shall also require the third party to maintain in effect a policy of commercial general liability insurance having a single limit of not less than \$5,000,000.00, which names both Landlord and Tenant as additional insureds and contains a contractual liability endorsement.

## **ARTICLE II**

### **EFFECTIVE DATE: TERM**

2.1 Effective Date. This Agreement shall become effective on the last to occur of (i) the date on which and executed copy of this Agreement is submitted to the Federal Maritime Commission ("FMC") for filing in accordance with the Shipping Act of 1984 or (ii) the date on which the Attorney General of the Commonwealth of Pennsylvania approves this Agreement (the "Effective Date"). Landlord shall cause this Agreement to be submitted to the FMC for filing promptly following execution.

2.2 Initial Term. As of the Effective Date, the term of this Agreement shall commence on January 1, 2010 and shall end on December 31, 2019 (the "Initial Term") unless extended or sooner terminated. The "First Lease Year" shall be calendar year 2010. Each "Lease Year" after the First Lease Year shall be the consecutive calendar year immediately following the preceding Lease Year.

2.3 Renewal Options.



2.3.1 Tenant shall have the options to extend the term of this Agreement for five (5) additional consecutive periods of one (1) year each (the “Renewal Periods” each a “Renewal Period”) at applicable Rent pursuant to Section 2.3.2 below, provided no default by Tenant has occurred during the then current term, and provided Tenant is not in default under this Agreement either at the time of exercising a given option or at the commencement of the Renewal Period in question. Tenant shall exercise the aforesaid options to extend by giving Landlord written notice of renewal at least 180 days prior to the end of the then current Term. The first Renewal Period shall begin on the day immediately following the last day of the Initial Term. The second Renewal Period shall begin on the day immediately following the last day of the first Renewal Period, the third Renewal Period shall begin on the day immediately following the last day of the second Renewal Period , the fourth and fifth Renewal Periods similarly after the last days of the third and fourth Renewal Periods, respectively. In the event Tenant shall fail to timely exercise its option with regard to a given Renewal Period, Tenant’s rights hereunder with regard to that Renewal Period and any subsequent Renewal Period shall immediately and irrevocably terminate. The terms and conditions applicable in the Renewal Periods shall be those specified for the Initial Term of this Agreement except for the Rent (as hereinafter defined) due from Tenant to Landlord which shall be determined for each Renewal Period as provided in Section 2.3.2 below and except that Tenant shall have no further renewal rights beyond the fifth Renewal Period.

2.3.2 The Rent to be paid by Tenant to Landlord during each Renewal Period (“Renewal Period Rent”) shall be adjusted upward as of the first day of each year of the Renewal Period according to any increase in the Consumer Price Index for all Urban Consumers for Philadelphia, Wilmington, Trenton, PA-DE-NJ-MD area, as published by the Bureau of labor

Statistics of the United States Department of Labor January 1 of the year immediately preceding the year of the respective Renewal Period to January 1 of the respective Renewal Period.

2.3.3 The Initial Term and any Renewal Periods as to which Tenant properly exercises its renewal option hereunder are hereinafter collectively referred to as the "Term". In the event that during the Initial Term the parties have failed to properly file this Agreement or any other document with the FMC, the parties shall undertake prior to the commencement of the first Renewal Period to file with the FMC an amendment extending this Agreement and any other instrument or agreement as applicable for such renewal.

2.4 Confirmation. Promptly following the Effective Date the parties shall execute and deliver to one another an agreement confirming the Effective Date which shall be prepared by Landlord and approved by Tenant, which approval shall not be unreasonably withheld or delayed.

2.5 Surrender of Possession: Holdover. Tenant shall peaceably deliver up and surrender possession of the Premises to Landlord at the expiration or sooner termination of this Agreement. Tenant shall not hold over in all or any part of the Premises after the termination or expiration of this Agreement without first obtaining the written approval of Landlord, which Landlord shall have no obligation whatsoever to grant. Any such holdover shall be deemed an extension of this Agreement on a month-to-month basis upon the same terms and conditions of this Agreement except that Tenant shall pay to Landlord as Rent during each month of the holdover period an amount equal to the greater of (i) one-twelfth (1/12) of one hundred fifty percent (150%) of the Rent, as hereinafter defined, payable for the twelve (12) months immediately preceding the inception of the holdover period, or (ii) an amount equal to the Rent determined pursuant to the terms hereof with respect to Tenant's operations during the holdover

period. Nothing in this Section 2.5 shall be deemed to give Tenant any right to hold over or to prevent Landlord from evicting Tenant or pursuing any other remedies in the event of such holdover.

2.6 Prior Agreement. As of the Effective Date, the term of the Prior Agreement shall retroactively terminate without right of further renewal effective as of the close of December 31, 2009.

### **ARTICLE III**

#### **RENT: PAYMENT**

3.1 Base Rent: Additional Rent.

3.1.1 Base Rent. Tenant in consideration of this Agreement shall pay to Landlord during the Initial Term an annual Base Rent ("Base Rent") as per the following schedule payable in equal monthly installments in advance, on the first day of each calendar month commencing on the Effective Date if the Effective Date is the first day of a calendar month, otherwise on the first day of the first calendar month following the Effective Date. If the Effective Date is other than the first day of a calendar month, Base Rent shall be prorated from the Effective Date through the end of the calendar month in which the Effective Date occurs, based on the number of days in such month, and shall be payable on the first day of the calendar month next following, together with the installment of Base Rent owing for such month.

**Rent Structure:**

<b>Year:</b>	<b>Base Rent:</b>	<b>Wharfage Fee:</b>	<b>Dockage Rate:</b>	<b>Barge Fee:</b>
Year 1	\$258,590.04	\$0.36	\$0.10	\$125.00
Year 2	\$258,590.04	\$0.36	\$0.10	\$125.00
Year 3	\$258,590.04	\$0.36	\$0.10	\$125.00
Year 4	\$258,590.04	\$0.36	\$0.10	\$125.00
Year 5	\$258,590.04	\$0.36	\$0.10	\$125.00
Year 6	\$258,590.04 +CPI	\$0.36+CPI	\$0.10+CPI	\$125.00+CPI
Year 7	Year 6 amount + CPI	Year 6 amount +CPI	Year 6 amount+CPI	Year 6 amount+CPI
Year 8	Year 7 amount + CPI	Year 7 amount+CPI	Year 7 amount+CPI	Year 7 amount+CPI
Year 9	Year 8 amount + CPI	Year 8 amount+CPI	Year 8 amount+CPI	Year 8 amount+CPI
Year 10	Year 9 amount + CPI	Year 9 amount+CPI	Year 9 amount+CPI	Year 9 amount+CPI

The CPI adjustment identified above shall be based upon the Consumer Price Index for all Urban Consumers for Philadelphia, Wilmington, Trenton, PA-DE-NJ-MD area, as published by the Bureau of labor Statistics of the United States Department of Labor from January 1 of the year immediately preceding the year of the respective adjustment to January 1 of the year of the respective adjustment. In the event CPI is a negative number, the rent will stay the same for that year.

3.1.2 Wharfage Fee. The Wharfage Fee above is applied per metric ton of cargo received from or loaded onto a vessel after loading or unloading 300,000 metric tons. Thus, wharfage is at no charge on tonnage up to 300,000 metric tons but is at \$0.36 per metric ton thereafter subject to CPI increase as shown above.

3.1.3 Dockage Fee. Tenant shall also pay to Landlord as additional rent a dockage fee equal to the Dockage Rate shown above per net registered ton for all vessels loading or off loading at the Premises (the “Dockage Fee”). The Dockage Fee above applies to all vessels except barges loading and off-loading cargo (active status) and is applied per net registered ton for each 24-hour period or fraction thereof. A fraction of a day shall be billed as a full day and not on a pro-rated basis.

3.1.4 Barge Fee. The Barge Fee applies to each barge docked for each 24-hour period or fraction thereof. A fraction of a day shall be billed as a full day and not on a pro-rated basis.

3.1.5 Payment of Wharfage, Dockage and Barge Fees. Tenant shall pay any applicable Wharfage, Dockage and Barge Fees to Landlord monthly, in arrears, based upon activity during the second preceding month, on or before the fifteenth (15<sup>th</sup>) day of the second calendar month following each calendar month (that is, the payment respecting fees owing for January will be due on or before March 15), together with a reasonably detailed written accounting showing (i) all product moved over the Premises to the Tenant’s Facility or handled by Tenant during the second preceding calendar month and any aggregate Wharfage Fee payable on account thereof, and (ii) a list of all barges and other vessels which docked at Berth #1 at Tenant’s consent or directions during the second preceding calendar month, the number of days each remained docked and the aggregate Dockage Fee and/or Barge Fee owing on account thereof. The Wharfage Fee, Dockage Fee and Barge Fee for the last month of the Term of this Agreement shall be due and payable on the fifteenth (15<sup>th</sup>) day of the second calendar month immediately following the date of termination or expiration of this Agreement. Tenant agrees to submit to Landlord on or before the sixtieth (60<sup>th</sup>) day following the end of each Lease Year

(including the last Lease Year) a written statement, signed and certified by Tenant's duly authorized financial officer to be true and correct, showing the computation of the fees and any adjustments to the data theretofore presented.

3.2 Late Charges. As compensation to Landlord for costs and expenses involved in handling delinquent payments, all Rent, as hereinafter defined, fees, and other charges that remain due and unpaid for a period of ten (10 ) days after the date they are due shall be subject to a delinquency charge equal to five percent (5%) of the unpaid charges and, in addition, in the event that any such charges remain unpaid more than thirty (30) days after the date on which they are due, Tenant shall pay to Landlord interest as accrued on the unpaid charges thereafter at the rate of one and one-half percent (1.5%) of said charges per month or fraction of month until the charges have been paid, including during the period following entry of any judgment respecting said charges. Said delinquency payment and interest are in addition to all other remedies that Landlord may have as provided in this Agreement or otherwise by law in equity to enforce payment of Rent or other charges that have accrued and have not been paid.

3.3 Books, Records and Reports. Within ten (10) days following the end of each calendar month, Tenant shall deliver to Landlord a true and correct copy of the manifest of every barge or other vessel which docked at the Premises during the immediately preceding calendar month (or such other form of information respecting such barges and vessels as Landlord may approve in its reasonable discretion), certified to be true and correct by an officer of Tenant. Additionally, Tenant shall deliver to Landlord each month, on or before the date Base Rent is payable for that month, a reasonably detailed report in form satisfactory to Landlord listing all barges and other vessels which have docked at the Premises during the second preceding month (and, if docked at Berth #1, stating the number of hours each remained docked) and all metric

tonnage of product of every sort received at the Premises or shipped from the Premises during such month (including all product received at the Premises from any source for storage) giving a breakdown of the product type and tonnage, which statement shall be certified to be true and correct by an officer of Tenant. Tenant shall prepare and keep on the Premises (or, after the Term has ended, at Tenant's office closest to the Premises) for a period of not less than twenty-four (24) months following the end of each Lease Year, true, complete and accurate books, records and accounts, conforming to generally accepted accounting principles consistently applied, relating to product received at or shipped from the Premises including without limitation all accounting of all product handled at the Premises with a breakdown of the type of product and the tonnage, manifests of the barge or other vessel, computer disks and all other data, matters and information of every kind and nature from which the Wharfage Fee and Dockage Fee can be determined. Any information received shall be treated as confidential information, proprietary to Tenant and its customers and may not be disclosed by Landlord (except to Landlord's employees, accountants, attorneys and related governmental agencies, and as may be required by law or ordered by a court of competent jurisdiction) without first securing Tenant's consent. Landlord shall have the right and privilege through its designated representatives at reasonable times, to inspect, audit and copy such books, records and accounts of Tenant in order to verify the accuracy of the amounts of Wharfage Fee and Dockage Fee due and owing by Tenant to Landlord hereunder, and Tenant agrees that all such books, records and accounts shall be made available to Landlord upon forty-eight (48) hours' prior written request. In no event shall the provisions of this paragraph be interpreted in a manner which would obligate Tenant to make available for inspection by Landlord or its designated representative any books or records of Tenant's business not directly germane to the computation of the Wharfage Fee or the Dockage

Fee. If any audit conducted by or for Landlord shows that during the period covered by such audit, Tenant has underpaid the Wharfage Fee or the Dockage Fee due to Landlord under the terms of this Agreement, Tenant shall immediately upon demand pay to Landlord the amount of such underpayment, together with interest accrued from the date such sum was originally due and payable under the terms of this Lease through the date of payment at a per annum rate which is four percent (4%) above the prime rate of interest reported in the Wall Street Journal on the date such sum was originally due and payable; and if any such audit shows that Tenant has underpaid the Wharfage Fee or the Dockage Fee by two percent (2%) or more, Tenant shall immediately upon demand pay to Landlord all costs and expenses incurred by Landlord in obtaining such audit. In all other events, Landlord shall pay for its audit. If any audit shall be commenced by Landlord or if there shall arise a dispute concerning the Wharfage Fee or the Dockage Fee, then Tenant's books of account and records shall be preserved by Tenant at the Premises (or, if the Term shall have expired, at Tenant's principal place of business) until such audit has been completed and final resolution of such dispute has been reached, notwithstanding that the aforesaid twenty-four (24) month period may have been exceeded.

3.4 Deposit. Tenant contemporaneously with the execution of this Agreement, will continue to maintain with Landlord the sum of \$25,000.00 (the "Deposit") already received. The Deposit shall be held by Landlord as security for the full and faithful performance by Tenant of all terms, covenants, and conditions of this Agreement by Tenant to be kept and performed during the Term. If at any time during the Term of this Agreement any of the Rent shall be overdue and unpaid, or any other sum payable by Tenant to Landlord hereunder shall be overdue and unpaid, then Landlord may, at its option, appropriate and apply any portion of the Deposit to the payment of any such overdue Rent or other sum. If the event of the failure of Tenant to keep



and perform any of the other terms, covenants and conditions of this Agreement to be kept and performed by Tenant, the Landlord, at its option, may appropriate and apply the Deposit, or so much thereof as may be necessary, to compensate Landlord for loss or damage sustained or suffered by Landlord due to such breach on the part of the Tenant. Should the entire Deposit, or any portion thereof, be appropriated and applied by Landlord as aforesaid, then Tenant shall, upon the written demand of Landlord, forthwith remit to Landlord a sum sufficient to restore said Deposit to the original sum deposited, and Tenant's failure to do so within five (5) days after receipt of such demand shall constitute a monetary default under this Agreement. Should Tenant comply with all of said terms, covenants and conditions and promptly pay all Rent hereunder provided for when due, and all other sums payable by Tenant to Landlord hereunder, the Deposit shall be returned in full to Tenant on or before ninety (90) days after the end of the Term of this Agreement or the earlier termination of this Agreement.

3.5 Rent. All sums payable by Tenant under this Agreement, whether or not stated to be Rent, Base Rent or additional Rent, or otherwise denominated (herein collectively referred to as "Rent"), shall be collectible by Landlord as rent and in the event of a default in payment thereof Landlord shall have the same right and remedies as for a failure by Tenant to pay Base Rent (without prejudice to any other right or remedy available therefore). All Rent shall be payable when due, without notice, demand, deduction or set-off, at the address of Landlord set forth in Section 18.1 below, or any other address of which Landlord shall hereafter give Tenant written notice. If Landlord, at any time or times, shall accept any payment of Rent after the same shall be due and payable hereunder, or shall accept any lesser amount than the sum then due on account of Rent, such acceptance shall not excuse delay upon subsequent occasions or constitute or be construed as a waiver of any of Landlord's rights hereunder with respect to such late or

partial payment. No payment by Tenant or received by Landlord of a lesser amount than the Rent herein stipulated shall be deemed to be other than on account of the earliest stipulated Rent, nor shall any endorsement or statement on any check or letter accompanying any check or payment as Rent be deemed an accord and satisfaction, and the Landlord may accept any such check or payment without prejudice to Landlord's right to recover the balance of such Rent or to pursue any other remedy provided for in this Agreement or available at law or in equity.

3.6 Utilities. Tenant shall pay all utility service costs, including without limitation, costs of water, electricity, gas, propane and sewer service billed with respect to the Premises. Tenant shall pay any such utility costs for which it is responsible directly to the billing agency for any such utility. Such payments shall be made when due and payable and prior to the imposition of any late charge or penalty by the supplier of the utility. Tenant shall be solely responsible for any such late charge or penalty.

#### **ARTICLE IV**

##### **LANDLORD'S RIGHT OF ACCESS TO THE DEMISHED PREMISES**

4.1 Visitors. Landlord and its invitees shall have the right of access to the Premises at all times during the Term, provided that, except in the event of an emergency, twenty-four (24) hours' prior telephonic or written notice, as Landlord elects, shall be required for access by persons other than Landlord's employees.

4.2 Property and Product Under Tenant's Control. Landlord reserves the right, but shall have no responsibility or obligation, to inspect the Premises as to fire hazards and other hazards of a like kind or nature. Landlord assumes no responsibility or liability for, and Tenant hereby releases Landlord from, loss or damage to the property of Tenant or property under the control of Tenant, whether caused by fire, water or otherwise, except to the extent such loss or

damage is caused by the gross negligence or willful misconduct of Landlord, its employees or contractors.

## **ARTICLE V**

### **INSURANCE; INDEMNIFICATION**

5.1 Property Insurance. Tenant shall keep the Premises and the contents of the Premises, including without limitation, improvements and betterments, and the Wharf Structure (defined in Section 6.2 hereof) continuously insured and/or self-insured during the Term against “all risks” of direct physical loss on a replacement cost basis as to the Premises and the Wharf Structure in accordance with replacement cost valuations provided by Landlord to Tenant. The amount of the deductible under any policy of insurance respecting the Premises maintained by Tenant under this Section 5.1 may not exceed the sum of \$25,000.00 or another amount agreed by the parties at a later date. Tenant shall cause the policy evidencing such insurance to name Landlord and the Commonwealth as loss payees and additional insureds.

5.2 Liability Insurance. During the Term, Tenant shall continuously keep in effect (a) maritime terminal operator’s liability insurance of at least Twenty-Five Million Dollars (\$25,000,000.00), single limit as to personal injury, death or property damage (including, without limitation, endorsement providing coverage for contractual liability, and sudden and accidental pollution liability). Tenant shall cause the policies evidencing such insurance to name Landlord and Commonwealth as additional insureds, and shall cause such policies to incorporate a cross liability endorsement provision as follows (or a substantially identical provision reasonably satisfactory to Landlord):

“In the event of claim being made by reason of personal injury, bodily injury or property damage suffered by any employee of one Assured hereunder for which

another Assured hereunder is or may be liable, then this policy shall cover such Assured against whom a claim is made or may be made in the same manner as if separate policies had been issued to each Assured hereunder.

In the event of one Assured incurring liability to any other of the Assureds, this policy shall cover the Assured against whom claim is or may be made in the same manner as if separate policies had been issued to each Assured. Nothing contained herein shall operate to increase underwriter's limit of liability as set forth in this policy."

5.3 Worker's Compensation Insurance. During the Term, Tenant shall require that any terminal operator and/or stevedoring company with which it contracts for services at the Premises maintain, in full force and effect at all times during the Term of this Agreement statutory workers' compensation insurance; \$1,000,000.00 of employers' liability insurance; United States Longshoremen's and Harbor Workers' Compensation Act insurance; Jones Act insurance; Occupational Disease Act insurance; and any disability benefits act insurance required by federal, state or local law, and Tenant shall maintain in full force and effect at all times during the Term for the benefit of Tenant's employees all of the foregoing insurance coverages excepting Jones Act insurance and Occupational Disease Act insurance.

5.4 Automobile Insurance. During the Term, Tenant shall continuously keep in effect comprehensive automobile liability insurance in the amount of Two Million Dollars (\$2,000,000.00) per each accident for bodily injury and property damage combined, naming Landlord and the Commonwealth as additional insureds.

5.5 Waiver of Subrogation. All casualty and property insurance policies carried by either party covering the Premises and Tenant's operations at the Premises shall expressly waive any right on the part of the insurer against the other party.

5.6 Insurance General.

5.6.1 Landlord's Purchase. If Tenant fails to maintain any insurance or self insurance required in this Agreement to be maintained by it, and such failure is not cured within five (5) days following Tenant's receipt of written notice thereof from Landlord, then Landlord may at its option procure same wherever available, at Tenant's expense, and the Tenant shall pay to the Landlord the cost thereof and such other costs incurred by Landlord in connection therewith, including without limitation Landlord's reasonable attorney's fees, on demand as Rent.

5.6.2 Requirements. Every policy of insurance required by this Agreement to be maintained by Tenant shall contain a provision prohibiting cancellation or termination thereof without at least thirty (30) days prior written notice excepting cancellation for non-payment of premium where ten (10) days notice shall be provided to Landlord and to the Commonwealth at the addresses designated from time to time in writing by Landlord and the Commonwealth, respectively. On or before the Commencement Date, and thereafter at least thirty (30) days before expiration of any policy, Tenant shall deliver to Landlord certificates of insurance and copies of the policy (if requested) in form satisfactory to Landlord evidencing each of the coverages that it is required to carry under this Article V.

5.6.3 Form of Policy. All policies required hereunder and any renewals thereof shall be in form satisfactory to Landlord, and shall reference the amount of the deductible. All policies shall be issued by companies with an AM Best rating of at least A-VII authorized to

engage in the insurance business in the Commonwealth of Pennsylvania, and shall be maintained in full force and effect during the Term of this Agreement.

5.6.4 Additional Insurance. Tenant shall also provide such additional types of insurance in such amounts as Landlord shall from time to time reasonably require. In the event that any such additional insurance is required, Tenant shall deliver certificates evidencing each policy to landlord within ten (10) days following receipt of Landlord's notice requiring same.

5.6.5 Use of Premises. Tenant agrees not to use the Premises in any manner that will result in the cancellation or increase in cost of any insurance policy that Landlord is required to carry hereunder.

5.6.6 Separate Insurance. Tenant shall not take out separate insurance that is concurrent in form with, or which contributes to an event or events of loss which are covered by, either the insurance required to be furnished by Tenant under this Article V, or the insurance Tenant may reasonably be required to furnish under this Article V, unless the Landlord and the Commonwealth are named in such policies as insureds, with loss payable as provided in this Agreement. Tenant shall immediately notify Landlord of the taking out of any such separate insurance and shall cause the policies therefore to be delivered to the Landlord as required herein.

5.6.7 Claims Made Policies. Tenant shall not obtain any insurance through policies written on a "claim made" basis without first notifying Landlord in writing and satisfying all of the following requirements: (1) the policy retroactive date shall coincide with or precede the cancellation or expiration date of the preceding "occurrence" liability policies; and (2) Tenant shall maintain such policy for at least four (4) years following the termination or expiration of the Term (whichever is later); and (3) if such insurance is prematurely terminated

for any reason, Tenant shall, in addition to securing immediate replacement coverage for such insurance, purchase an extended reporting provision of at least four (4) years duration to report claims arising from this Agreement or Tenant's occupancy; and (4) the policy shall allow for the report of circumstances or incidents which might give rise to future claims.

5.6.8 Blanket Policies. Any insurance required of Tenant under this Article V may be effected by a blanket or multi-peril or all-risk policy or policies issued to the Tenant or to any person with which Tenant is affiliated, and covering the Premises as well as other properties owned by or leased to Tenant or affiliated person, provided that (a) such policy or policies shall be satisfactory to and approved by Landlord and shall comply in all respects with the provisions of this Agreement and (b) the amount of insurance allocated thereunder to Tenant's property located in the Premises shall be specified either in such policy or policies or in an endorsement thereto and shall equal the amounts required under this Agreement.

5.7 Accident Reports. Tenant shall provide a report to Landlord in writing, as soon as practicable but in any event within two (2) business days after Tenant, its officers, or agents have knowledge of any accident or occurrence (a) involving death of or injury to any person or persons involving emergency room care, hospitalization, or upon the subsequent filing of a claim by or on behalf of the injured or deceased, or (b) involving loss or damage in excess of Ten Thousand Dollars (\$10,000.00) to the Premises or to property of any person other than Tenant occurring upon or about the Premises. All such reports shall include to the extent available and appropriate, (1) the names and addresses of the person s involved; (2) a general statement as to the nature and extent of the injury or damage; (3) the date and hour of the occurrence; (4) the names and addresses of witnesses; and (5) such other information reasonably requested by Landlord as may be known to Tenant, its officers, employees or agents.

5.8 Liability for Damages Caused by Third Parties. Tenant shall at all times maintain necessary security on the Premises to assure that the Premises is not used by anyone not having the permission of the Tenant or Landlord. Subject to Section 1.6 hereof, Tenant is and shall be solely liable for all damage to the Premises which is caused by third parties not authorized to be upon the Premises, or by Tenants employees, agents, contractors, invitees or licensees; provided, however, nothing herein contained shall be deemed a waiver of Tenant's right of subrogation with respect to such third parties, except if, and to the extent, otherwise provided in Section 5.5 hereof.

5.9 Event of Loss. In the event of loss or damage to the Premises, Tenant shall give notice thereof as soon as practicable to Landlord, and Landlord may make proof of loss if not made promptly by Tenant; any adjustment of a proof of loss shall require the prior written consent of Landlord, which shall not be unreasonably withheld or delayed. From time to time, within fifteen (15) days following receipt of Landlord's written request, Tenant shall provide to Landlord written notice as to the status of any given claim and shall advise Landlord as to the dollar amount of any proposed property damage settlement from the property insurer(s). Each insurance company issuing any property insurance policies in respect to the Premises is hereby authorized and directed to make payment under such insurance directly to Landlord instead of to Tenant and Landlord jointly, and Tenant appoints Landlord, irrevocably, as Tenant's attorney-in-fact to endorse any draft thereof. Such policies of property insurance and all renewals thereof are hereby assigned to Landlord as additional security for Tenant's performance of its obligations hereunder, and Tenant agrees that after default hereunder any values available thereunder upon cancellation or termination of any said policies or renewals, whether in the form of return of premiums or otherwise, shall be payable to Landlord as assignee. Prior to Tenant



performing any repairs related to a loss that has had funds paid to the PRPA and or the Commonwealth, Landlord and Tenant shall enter into a mutually acceptable agreement for reimbursement of costs for the repairs.

5.10 Insurance Audit. Prior to the commencement of the first Renewal Period, Tenant and Landlord shall cause an insurance audit to be conducted by an insurance consultant jointly appointed by them to determine the adequacy and availability at commercially reasonable rates of the types of insurance and the amounts of coverages then being carried by Landlord and Tenant. Tenant and Landlord agree that promptly following such insurance audit this Article V shall be amended to conform to the recommendations of the insurance audit and Landlord and Tenant, as appropriate, shall promptly obtain and maintain such insurance in such amounts as this Agreement, as so amended, shall require. Both parties agree to act reasonably and in good faith in jointly choosing the insurance consultant required hereunder. Upon receipt of a bill from such insurance consultant for services rendered, Landlord and Tenant shall pay one-half of such bill within thirty (30) days (Tenant's payment of its share of such bill constitutes additional rent owing under this Lease).

5.11 Release and Indemnification.

5.11.1 Tenant agrees that Landlord, the Commonwealth and their respective agents, employees, officers, directors, shareholders and partners (the "Releasees") shall not be liable to Tenant and Tenant hereby releases said parties from any liability, for any personal injury, loss of income or damage to or loss of persons or property, or loss of use of any property, in or about the Premises or the Common Area from any cause whatsoever unless such damage, loss or injury results from the gross negligence or willful misconduct of Landlord, the Commonwealth or their respective officers, employees, agents, contractors, subcontractors or

invitees. Without limiting the generality of the foregoing Tenant agrees that the Releasees shall have no liability to Tenant for any personal injury, death or property damage arising from or out of the acts or omissions of any third parties to which Landlord grants permission to dock at Berth #1 pursuant to Section 1.5 of this Agreement, unless Landlord shall have failed to obtain from the third party or third parties in question the agreement referenced in Section 1.6 hereof.

5.11.2 Tenant shall defend, indemnify, save and hold harmless (“Indemnify”) Landlord, the Commonwealth and their respective agents, employees, officers, directors, shareholders, and partners from and against all liabilities, obligations, damages, penalties, claims, causes of action, costs, charges and expenses, including reasonable attorney’s fees, court costs, administrative costs, and costs of appeals which may be imposed upon or incurred by or asserted against any of them to the extent arising out of any of the following which shall occur during the Term of this Agreement, during any holdover period after expiration or termination of the Term, or during any period of time prior to the Effective Date when Tenant may have been given access to or possession of all or any portion of the Premises or the Common Area:

- (1) Any work or act done in, on or about the Premises or the Common Area or any part thereof at the direction of or caused by Tenant, its agents, contractors, subcontractors, servants, employees, licensees or invitees;
- (2) Any negligence, tort or other wrongful act or omission on the part of Tenant or any of its agents, contractors, subcontractors, servants, employees, subtenants, licensees or invitees;
- (3) Any accident, injury or damage to any persons or property occurring in, on or about the Premises or any part thereof, unless caused by the gross negligence of Landlord, the Commonwealth, or their respective employees or agents, or unless

caused by the negligence or willful misconduct of any third party to which Landlord has granted permission to use Berth #1 pursuant to Section 1.5 of this Agreement (in which latter event Tenant agrees to look solely to the indemnification provided by such third party as contemplated under Section 1.6 of this Agreement); and

- (4) Any failure on the part of Tenant to perform or comply with any of the covenants, agreements, terms, provisions, conditions or limitations contained in this Agreement on its part to be performed or complied with.

5.11.3 The obligation of Tenant to Indemnify contained in Section 5.11.2 shall not be limited by any limitation on the amount or type of damages, compensation or benefits payable by or for tenant, its agents or contractors under workers' or workmen's compensation acts, disability benefit acts or other employee benefit acts, or under any other insurance coverage Tenant may obtain.

5.11.4 The release and indemnification given in this Section 5.11 shall survive the expiration or termination of this Agreement and the Term.

## **ARTICLE VI**

### **MAINTENANCE, REPAIR, EQUIPMENT**

#### **AND IMPROVEMENTS**

6.1 Tenant's Maintenance and Repair Obligations. Tenant shall, at all time, keep the Premises in a neat, clean and orderly condition. Tenant shall perform all maintenance and repair, including, without limitation, sweeping; snow removal; trash removal; painting; traffic or pier striping; relamping of Premises; repair of all lighting fixtures and standards; replacing light bulbs; opening and cleaning closed or clogged drains; storms drain inlet maintenance and repair,

plumbing, wiring and all other systems and improvements contained in the dock building upon the Premises; and repairing and maintaining fencing. Tenant shall use every reasonable precaution against fire. Tenant shall perform maintenance and repair of water (including, without limitation, water supply lines and operating devices), sewer and electric (starting at the secondary voltage terminal of the transformer banks) utilities upon the Premises. Tenant shall be liable, at its own expense to make all repairs to windows, irrespective of cause of damage. Tenant's obligations hereunder shall be to maintain and repair those elements of the Premises for which it is responsible in the condition they were in on the Effective Date, subject to normal wear and tear. Tenant shall be responsible for causing those items which it is Tenant's responsibility to repair and maintain hereunder to conform to all governmental laws, regulations and requirements respecting same.

6.2 Wharf Structure. Landlord shall maintain and repair the Wharf Structure, as hereinafter defined, the fender systems of the Premises, and the electric power system transformer bank(s) and related primary electric equipment serving the Premises, in their "as is" condition as of the Effective Date; provided, however, that (a) Landlord's obligation to repair casualty damage to the Wharf Structure shall be as set forth in Article XI hereof, and (b) Landlord's obligation to undertake maintenance and repair of the Wharf Structure which will entail substantial unbudgeted expenditures shall be contingent upon Landlord receiving capital funds from the Commonwealth sufficient to perform such work (and Landlord agrees to undertaken commercially reasonable efforts to obtain sufficient capital funds to fulfill its obligations under this Section 6.2). Landlord shall be responsible for causing those items which it is Landlord's responsibility to repair and maintain hereunder to conform to all governmental laws, regulations and requirements respecting same. Notwithstanding anything to the contrary in

this Agreement, if damage which is Landlord's responsibility to repair hereunder is caused by the acts of or failure to act by Tenant, its officers, employees, agents, contractors, invitees, or licensees, including persons performing work on the Premises at the request or under the direction of Tenant, Landlord may, in Landlord's sole discretion, after notice to Tenant, make all necessary repairs and Tenant shall pay to Landlord upon demand and as additional Rent all costs and expenses incurred by Landlord in making such repairs upon presentation of supporting documentation by Landlord to Tenant, to the extent such costs are not reimbursed by insurance. for the purpose of this Agreement, the "Wharf Structure" shall mean and be defined as the decking and curbing, beams, girders, subsurface support slabs, and prestressed concrete or wood pilings located on the Premises between the pierhead line and the bulkhead line of the Delaware River.

6.3 Fire Systems. All fire protection sprinkler systems, fire hydrant systems, standpipe systems, fire alarm systems, portable fire extinguishers and other fire protective or extinguishing systems or appliances which have been or may be installed on the Premises shall be maintained, repaired, supplemented or replaced, as may be necessary, so as to be in compliance with all applicable laws at all times, by Tenant, at its sole cost and expense, and in accordance with all applicable laws, including without limitation, the City of Philadelphia Fire Code and all additions, revisions and amendments thereto, and in accordance with the recognized standards relating thereto.

6.4 Load Limits. Tenant shall not place loads on the Premises in excess of seven hundred (700) pounds per square foot.

6.5 [Intentionally omitted.]

6.6 [Intentionally omitted.]

6.7 Condition and Surrender of the Premises. Tenant accepts the Premises, including, without limitation, all improvements, structures and facilities upon the Premises, in their condition existing at the Effective Date, with all faults, “as is”, “where-is” and without warranty (expresses or implied), subject only to Landlord’s performance of its obligations contained in this Agreement. Tenant’s occupation or use of the Premises shall in itself constitute acknowledgment of such acceptance, and Landlord shall not be obligated to make any improvements or repairs thereto, except as specifically provided elsewhere in this Agreement. Subject to Tenant’s election in 6.12, Tenant covenants and agrees that at the expiration of the Term it will quit and surrender the Premises with all the improvements thereon in as good a state and condition as the same are required to be maintained under this Agreement, and all decks and berths will be left in a clean condition with no build-up of dirt and debris, subject to normal wear and tear.

6.8 Equipment. Tenant shall provide all equipment necessary for the proper and efficient operation of the Premises.

6.9 Access. Landlord, its contractors, invitees and their respective employees have the right of access to the Premises at all times to perform their respective duties, responsibilities and jobs as contemplated under this Article VI and to determine the state of maintenance and repair. Landlord will schedule such access, to the extent reasonably possible, so as not to materially interfere with Tenant’s operations at the Premises, but need not schedule such access if Landlord deems an emergency to exist.

6.10 Landlord’s Rights. Should Tenant fail to make any repairs or perform any maintenance for which it is responsible, Landlord shall have the option to make or perform the same (but need not do so) if Tenant fails to do so after having received thirty (30) days written

notice from Landlord or immediately if, in Landlord's business judgment, the repairs required must be made to prevent damage, injury or loss to persons or property. Within ten (10) days following receipt of an invoice together with reasonable supporting documentation from Landlord. Tenant shall reimburse Landlord for the Landlord's actual cost of such repairs as additional Rent. The making of such repairs by Landlord shall in no event be construed as a waiver of the duty of Tenant to make repairs as herein provided.

6.11 Dredging.

6.11.1 Semi -annually during the Term, Tenant shall undertake soundings of Berth #1 and Berth #2 and shall deliver the results thereof to Landlord, at Tenant's sole expense (the "Soundings"). During the Term, Landlord shall at its sole costs and expense, and at such times as it reasonably determines necessary, based upon the Soundings, conduct maintenance dredging alongside Berth #2 to a depth of 34 feet, plus 2 feet over-dredge, from Mean Low Water Datum; **provided, however,** that Landlord's obligation to undertake such dredging shall be absolutely contingent upon Landlord obtaining all necessary permits and approvals which are prerequisite thereto (which permits and approvals Landlord agrees to pursue in a commercially reasonable manner). Landlord shall conduct maintenance dredging to the depth required in the immediately preceding sentence alongside Berth #2 so long as a business need exists for such a depth to be maintained. Landlord's obligations as set forth in this Section 6.11.1, are clarified by a letter dated March 25, 2008, from Landlord to Tenant respecting its responsibilities for dredging (the "Dredging Letter"). In addition to the foregoing, Landlord shall perform its responsibilities for dredging consistent with the terms of the Dredging Letter, which is hereby incorporated into this Agreement by reference.

6.11.2 During the Term, Tenant may at its sole costs and expense, and at such times as Tenant determines to be necessary, conduct maintenance dredging alongside Berth #1, upon Tenant's obtaining all necessary permits and approvals which are prerequisite thereto.

6.11.3 Tenant assumes all liability, under all applicable federal, state and local laws, statutes and regulations, for wire, steel bands, baling wires, trash of any kind, timbers, pieces of steel and the like, that may be encountered by dredges working in the docks and waterways adjacent to the Premises, and Landlord shall remove and dispose of such materials, when encountered at Berth #2 (and Tenant shall do so at Berth #1), at Tenant's sole expense, in which event Tenant shall pay to Landlord on demand Landlord's costs incurred in the removal and disposal of such materials as well as any costs incurred by Landlord, including without limitation fines, reasonable attorney's fees and court costs, as a result of any alleged liability of Landlord for the presence of such materials at either Berth #1 or Berth #2 under applicable federal, state and local laws, all of which sums shall be payable on demand as additional Rent.

6.12 Tenant's Improvements. During the Term, except for emergency repairs, Tenant shall not make any alterations, additions or improvements to the Premises without first receiving the written consent of Landlord. Landlord will not unreasonably withhold or condition its consent to nonstructural alterations, additions or improvement proposed by Tenant (the "Trade Fixtures"). Landlord may at its option require Tenant, at Tenant's expense, to remove upon the expiration or sooner termination of the Term any alterations, additions or improvements constructed by Tenant upon the Premises, in which event Tenant shall also repair and restore the Premises to the condition which existed immediately prior to the installation of the item so removed, at Tenant's sole cost and expense. It is intended that Tenant will own the Trade Fixtures during the Term. At Tenant's election, Tenant may remove the Trade Fixtures upon the



expiration or sooner termination of the Term, and repair and restore the Premises to the condition which existed immediately prior to the installation of the item so removed, at Tenant's sole cost and expense. Except for (a) Tenant's removal of Trade Fixtures as permitted under this Section 6.12 and (b) Tenant's removal of alterations, additions or improvements required to be removed by Landlord pursuant to this Section 6.12, Tenant shall leave upon the Premises at the expiration or sooner termination of the Term all alterations, additions or improvements constructed by Tenant during the Term, in the condition in which such items are required to be maintained under the terms of this Agreement, whereupon title to all such alterations, additions or improvements (including, without limitations, Trade Fixtures not removed as above provided) shall vest in Landlord.

## **ARTICLE VII**

### **TAXES**

7.1 Taxes. Tenant covenants and agrees to pay in full when due, without demand, all lawful taxes, assessments or charges which may be levied by any federal, state, county or city, or by any tax or assessment levying agency upon Tenant's interest in this Agreement or any activities or rights pursuant thereto, as well as all taxes, assessments, duties and charges on goods, merchandise, fixtures, appliances, equipment and property owned or brought upon the Premises by or through Tenant, as well as any real estate taxes that may hereafter be imposed during the Term upon or against the Premises (real estate taxes to be, at Landlord's option, either paid to Landlord within ten (10) days after billing or paid directly to the appropriate agency of the taxing authority, in which later case Tenant shall deliver to Landlord official receipts evidencing payment thereof within ten (10) days after payment) (collectively "Impositions").

7.2 Appeal. Tenant shall have the right to contest or object to the amount or validity of any such Impositions by appropriate legal proceedings, but this shall not be deemed or construed in any way as relieving, modifying or extending the covenants of Tenant to pay any such Impositions at the time and in the manner provided in Section 7.1, unless Tenant shall have given prior written notice to Landlord of intent to so contest or object to an Imposition, and unless, at Landlord's sole option, (i) Tenant shall demonstrate to Landlord's satisfaction that the legal proceeding shall operate conclusively to prevent the placing of a lien on the Premises, or any part thereof, to satisfy such Imposition prior to final determination of such proceedings; or (ii) Tenant shall furnish a good and sufficient bond or surety as requested by and satisfactory to Landlord; or (iii) Tenant shall have provided Landlord with a good and sufficient undertaking as maybe required or permitted by law to accomplish a stay of such proceedings.

## **ARTICLE VIII**

### **ENVIRONMENTAL MATTERS**

8.1 Environmental Matters. Tenant covenants that it shall comply at all times with the following terms of this Agreement relating to environmental matters.

8.2. Use of Premises. Tenant represents, warrants and covenants that (i) the Premises will not be used in a manner which will result in the premises being characterizes as a "hazardous waste facility" under any applicable Environmental Laws (as hereinafter defined) or as such term is commonly used in the context of environmental insurance underwriting, (ii) it will not bring, generate, treat, store or dispose of Hazardous Substances (as hereinafter defined) at the Premises except in strict accordance with all applicable Environmental Laws, (iii) it shall at all times comply and shall cause the Premises to comply with all Environmental Laws, and (iv) it will keep the Premises free of any lien imposed pursuant to any Environmental Laws.

8.3 Reporting Requirements. Tenant warrants that it will promptly deliver to the Landlord, (i) copies of any documents received from any federal, state, county or municipal environmental or health agency (including, without limitation, the United States Environmental Protection Agency and the Pennsylvania Department of Environmental Protection) concerning the Tenant's operations upon the Premises, (ii) copies of any documents submitted by the tenant to any federal, state, county or municipal environmental or health agency (including, without limitation, the United States Environmental Protection Agency and the Pennsylvania Department of Environmental Protection) concerning its operation on the Premises, including but not limited to copies of all permits, licenses, annual filings and registration forms and, (iii) upon the request of Landlord, Tenant shall provide Landlord with evidence of compliance with Environmental Laws.

8.4 Termination, Cancellation, Surrender. At the expiration or earlier termination of this Agreement, Tenant shall surrender the Premises to Landlord free of any and all Hazardous Substances excepting any present upon the Premises prior to Tenant's occupancy, and in compliance with all Environmental Laws (excluding any noncompliance existing prior to Tenant's occupancy) and to the complete satisfaction of Landlord.

8.5 Hazardous Waste Facility Endorsement. In the event that Landlord shall hereafter at any time determine that Tenant is operating the Premises as a "hazardous waste facility" in breach of the representation and warranty contained in Section 8.2. above, then without limiting Landlord's rights or remedies with respect to such breach, Tenant agrees that upon Landlord's demand Tenant shall immediately obtain and thereafter continuously keep in effect a Hazardous Waste Facility Endorsement (or its statutory equivalent) to Tenant's marine terminal operator's insurance coverage, providing coverage for sudden accidental occurrences in the amount of

\$5,000,000.00 per each occurrence and \$10,000,000.00 in the aggregate, or such higher limits as may be required by law, with Landlord and Commonwealth named as additional insureds, and also providing coverage for defense costs.

8.6 Permitted Substances. Subject to the provisions of this Article and to the prior written consent by Landlord which may be given or withheld in Landlord's sole discretion, Tenant shall be entitled to use and store on the Premises only reasonable quantities of those Hazardous Substances which are necessary for Tenant's business, provided that such usage and storage, and Tenant's disposal of all waste resulting therefrom, are in full compliance with all applicable Environmental Laws.

8.7 Storage Tanks. Tenant shall not be entitled to install any tanks under, on or about the Premises for the storage of Hazardous Substances without the express written consent of Landlord, which may be given or withheld in Landlord's sole discretion.

8.8 Landlord's Right of Access and Inspection. Landlord shall have the right but not the obligation, at all times during the Term to (i) inspect the Premises, (ii) conduct tests and investigations and take samples to determine whether Tenant is in compliance with the provisions of this Article, and (iii) request lists of Hazardous Substances used, stored or located on the Premises. If Tenant is determined to be in violation of Environmental Laws, the cost of all such investigations, tests and inspections shall be borne by Tenant and reimbursed to Landlord on demand as additional Rent.

8.9 Violations – Environmental Defaults.

8.9.1 Tenant shall give to Landlord immediate verbal and follow-up written notice of any actual, threatened or suspected spills, releases or discharges of Hazardous Substances on the Premises, caused by the acts or omissions of Tenant or its agents, employees,

representatives, invitees, licensees, subtenants, customers and contractors. Except for spills, releases or discharges occurring as a result of the use of Berth #1 by a third party with whom Landlord contracts pursuant to Section 1.5 hereof, Tenant covenants to promptly investigate, clean up and otherwise remediate any spill, release or discharge of Hazardous Substances caused by the acts or omissions of Tenant or its agents, employees, representatives, invitees, licensees, subtenants, customers or contractors at Tenant's sole cost and expense; such investigation, clean up and remediation to be performed in accordance with all Environmental Laws and to the satisfaction of Landlord and after Tenant has obtained Landlord's written consent, which shall not be unreasonably withheld. Tenant shall return the Premises to the condition existing prior to the introduction of any such Hazardous Substances.

8.9.2 In the event of (1) a violation by Tenant or its employees, agents or contractors of an Environmental Law, (2) a release, spill or discharge of a Hazardous Substance on or from the Premises by Tenant or its employees, agents or contractors, or (3) the discovery of an environmental condition requiring response which violation, release, or condition is attributable to the acts or omissions of Tenant, its agents, employees, representatives, invitees, licensees, subtenants, customers, or contractors, or (4) an emergency environmental condition caused by or attributable to Tenant or its employees, agents or contractors, or (5) any breach by Tenant of its representation and warranty contained in Section 8.2 above (together "Environmental Defaults"), Landlord shall have the right, but not the obligation, to immediately enter the Premises, to supervise and approve any actions taken by Tenant to address the violation, release, or environmental condition, or if the Landlord deems it necessary, then Landlord may perform, at Tenant's expense, any lawful actions necessary to address the violation, release, or environmental condition.

8.9.3 Subject to Tenant's right to undertake remediation in accordance with Section 8.9.1, above, Landlord has the right, but not the obligation, to cure any Environmental Defaults. Landlord also has the right to suspend some or all of the operations of the Tenant until Landlord has determined to its sole satisfaction that appropriate measures have been taken, and has the right to terminate this Agreement upon the occurrence of an Environmental Default. Tenant will continue to remediate the incident of November 2, 2007 ("Incident"), as per its letter of that date to Pennsylvania Department of Environmental Protection subject to these provisions. So long as Tenant reasonably proceeds to remediate the Incident, PRPA will not take any adverse action under the lease for said Incident.

8.10 Additional Rent. Any expenses which Landlord incurs, which are to be at Tenant's expenses pursuant to this Article, will be considered additional Rent under this Agreement and shall be paid by Tenant on demand to Landlord.

8.11 Assignment and Subletting. Notwithstanding anything to the contrary in this Agreement, the Landlord may condition its approval of any assignment or subletting by Tenant upon Landlord's determination that the proposed assignee or subtenant, in the sole judgment of the Landlord, does not create any additional environmental risk or exposure.

8.12 Indemnification. Subject only to Section 8.14, below, Tenant shall indemnify, defend (with counsel approved by Landlord) and hold Landlord, the Commonwealth and their respective affiliates, shareholders, directors, officers, employees and agents harmless of, from and against any and all claims, judgments, damages (including consequential damages), penalties, fines, liabilities, losses, suits, administrative proceedings, costs and expenses of any kind or nature, known or unknown, contingent or otherwise, which arise out of the acts or omissions of Tenant, its agents, employees, representatives, invitees, licensees, subtenants,

customers or contractors during or after the Term of this Agreement (including, but not limited to, attorneys, consultant, laboratory and expert fees and including without limitation, diminution in the value of the Premises, damages for the loss or restriction on use of any facility or amenity of the Premises and damages arising from any adverse impact on marketing of space in or about the Premises), arising from or related to any Environmental Default.

#### 8.13 Definitions.

8.13.1 “Hazardous Substances” means, (i) asbestos and any asbestos containing material and any substance that is then defined or listed in, or otherwise classified pursuant to, any Environmental Law or any applicable laws or regulations as a “hazardous substance”, “hazardous material”, “hazardous waste”, “infectious waste”, “toxic substance”, “toxic pollutant” or any other formulation intended to define, list, or classify substances by reason of deleterious properties such as ignitability, corrosivity, reactivity, carcinogenicity, toxicity, reproductive toxicity, or Toxicity Characteristic Leaching Procedure (TCLP) toxicity, (ii) any petroleum and drilling fluids, produced waters, and other wastes associated with the exploration, development or production of crude oil, natural gas, or geothermal resources and (iii) petroleum products and by products, polychlorinated biphenyls, urea formaldehyde, radon gas, radioactive material (including any source, special nuclear, or by-product material), and medical waste.

8.13.2 “Environmental Laws” collectively means and includes all present and future federal, state and local laws and any amendments thereto (whether common law, statute, rule, order, regulation or otherwise), permits, and other requirements or guidelines of governmental authorities applicable to the Premises and relating to the environment and environmental conditions or to any Hazardous Substance (including, without limitation, CERCLA, 42 U.S.C. §9601, et seq; the Resource Conservation and Recovery Act of 1976, 42

U.S.C. §6901, et seq; the Hazardous Materials Transportation Act, 49 U.S.C. §1801, et seq; the Federal Water Pollution Control Act, 33 U.S.C. §1251, et seq; the Clean Air Act, 33 U.S.C. §741, et seq; the Toxic Substances Control Act, 15 U.S.C. §2601-2629; the Safe Drinking Water Act, 42 U.S.C. §300f-300j; the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. §1101, et seq; the Pennsylvania Hazardous Sites Cleanup Act; the Pennsylvania Clean Streams law; any so-called “Super Fund” or “Super Lien” law; any law requiring the filling of reports and notices relating to hazardous substances, environmental laws administered by the Environmental Protection Agency; and any state and local laws and regulations similar to any of the foregoing, all amendments to all of the foregoing and all regulations, orders, decisions, and decrees now or hereafter promulgated thereunder concerning the environment, industrial hygiene or public health or safety).

8.14 Limitations. Nothing contained herein shall make or be deemed to make Tenant responsible or liable for contamination present on the Premises on the Effective Date, or for contamination thereafter caused (a) solely by Landlord, its contractors or invitees, or (b) solely by any third party to which Landlord grants the right to dock at Berth #1 pursuant to Section 1.5 of this Agreement.

8.15 Disposal and Removal of Solid Wastes. Tenant shall, at its sole cost, contract with a reputable, private refuse removal company, licensed under applicable laws (and shall give Landlord prompt written notice of the identity of each such company, together with a true and correct copy of such company’s license, upon Landlord’s request and also promptly following any change from one company to another), for the removal and disposal of any solid waste (other than solid wastes lawfully discharged through the City’s sewer system) generated or introduced by Tenant from the Premises, in accordance with all Environmental Laws.



8.16 Remedies.

8.16.1 Upon material breach by Tenant of any provision of this Article VIII, or upon a pattern of less significant breaches, Landlord may at its sole discretion terminate this Agreement by written notice to Tenant, whereupon Tenant shall immediately vacate the Premises.

8.16.2 The parties recognize that no adequate remedy at law may exist for a breach of this Article VIII. Accordingly, either party may obtain specific performance of any provisions of this Article VIII.

8.16.3 This Section 8.1 6 shall not be construed to limit any remedies which either party may have against the other at law or in equity for a breach of this Article VIII.

8.17 Environmental Audit at End of Term. At the end of the Term or upon sooner termination of this Lease, Tenant shall contract, at Tenant's expense, with a reputable environmental contractor approved in advance by Landlord, which shall undertake an environmental= inspection and audit of the Premises to determine whether any Environmental Defaults have occurred during the Term (which shall be satisfactory in scope to Landlord in Landlord's reasonable discretion and shall include, without limitation, such sampling and testing on and around the Premises as Landlord shall reasonably determine to be appropriate in order to determine whether an Environmental Default has occurred. Landlord and Tenant shall jointly prepare the instructions to Tenant's environmental contractor as to the scope of work to be undertaken, and Landlord shall receive a copy of all data, finding, reports and certifications prepared by or for Tenant's environmental contractor in connection with or arising out of the performance of such work. Upon completion (to Landlord's satisfaction) of such report and the

remediation to Landlord's satisfaction of any Environmental Defaults revealed thereby, Tenant's indemnification obligations contained in this Article VIII shall terminate.

## **ARTICLE IX**

### **ASSIGNMENT AND LICENSING**

9.1 Assignment and Licensing. Upon at least thirty (30) days prior written notice to Landlord, but without the need for Landlord's consent, Tenant may assign this Agreement or sublet the entire Premises (but not a lesser portion thereof) at any time during the Term to any entity (including, without limitation, a corporation, partnership or limited liability company) in the event that either (a) Tenant owns a majority of the voting shares or other equity interest in such entity, enabling Tenant to control the management thereof, or (b) the entity in question results from the consolidation or merger of Tenant into or with any other business operation, or (c) such entity has acquired (i) a majority of Tenant's issued and outstanding capital stock or (ii) substantially all of Tenant's assets or (iii) Tenant's Facility and (solely if such entity has acquired Tenant's Facility) either furnishes Landlord with a financial statement reflecting a tangible net worth reasonably satisfactory to Landlord or provides Landlord with an acceptable guaranty of Tenant's obligations under this Lease by a third party or tangible net worth acceptable to Landlord. In all other events, Tenant shall not, either directly or indirectly, assign, hypothecate, encumber or transfer this Agreement or any interest therein, or lease or sublease the Premises in whole or in part, without the prior written consent of Landlord, to be given or withheld in Landlord's sole discretion. For purposes of this Section, an assignment shall include any pledge, mortgage or encumbrance of Tenant's interest under this Agreement. No such assignment or transfer shall relieve the assigning or transferring entity from liability for performance of all obligations of the Tenant under this Agreement for the entire Term. No

assignment of this Agreement or sublease permitted hereunder (whether or not Landlord's consent thereto is required) shall be valid unless and until the assignee or sublessee delivers to Landlord a duly executed acknowledgement, in reasonable form prepared by Landlord, (a) in the event of any assignment, confirming Landlord's right to confess judgment upon a default as herein provided, or (b) in the event of a sublease, confirming that the subtenant's rights under the sublease are no greater than Tenant's rights under this Agreement.

9.2 Landlord's Assignment and Successors. Landlord shall have the right to assign, hypothecate, or transfer this Agreement, its interest in and to the Premises, or any interest in either of the foregoing in whole or in part.

9.3 Terms Binding on Successors. All the terms, covenants and conditions of this Agreement shall inure to the benefit of and be binding upon the successors and assigns of the parties hereto. The provisions of this Section 9.3 shall not be deemed a waiver of any of the conditions against assignment by Tenant hereinbefore set forth.

## **ARTICLE X**

### **TENANT'S COVENANTS**

10.1 Liens and Encumbrances. Subject to Tenant's rights to create a leasehold mortgage under Article IXX below, Tenant shall keep the Premises free and clear of all liens and encumbrances arising or growing out of its use of the Premises. At Landlord's request, Tenant shall furnish Landlord with written proof of payment of any item which would constitute the basis for such a lien on the Premises if not paid.

10.2 Landlord Regulations. Tenant shall comply with all reasonable rules and regulations of Landlord, as provided by written notice to Tenant, pertaining to the Premises or any buildings or structures located thereon, either now in existence or hereafter promulgated for

the general safety and convenience of Landlord, its tenants, invitees, licensees and the general public to the extent that such rules and regulations do not materially conflict with the terms of this Lease.

10.3 Non-Competition. During the Term, Tenant shall not solicit business from any customer at a facility owned or leased by Landlord for business or cargo then handled at such facility; provided, however, that if Landlord shall hereafter lease any waterfront facility owned by Landlord to another operator of a bulk liquid storage facility and such lease does not contain a clause identical to this Section 10.3, then this Section 10.3 shall cease to be of any further force or effect.

10.4 Railroads. Tenant covenants and agrees that any railroad upon the Premises shall be operated to the “belt line principle”; i.e., no railroad shall be granted an exclusive right to deliver and/or receive railcars to and from the Premises.

10.5 Operations. Tenant shall occupy and operate the Premises continuously during the Term and conduct its business thereon in such a manner as to maximize the tonnage of cargo handled at the Premises, subject to the following:

10.5.1 Tenant’s duty to maximize the tonnage of cargo handled at the Premises under this Section 10.5 shall not include or take into consideration (i) a duty to change the current configuration of Tenant’s Facility or to install new pipes or (ii) a customer’s election to use a method of delivery other than through the Premises (provided that Tenant shall at all time offer commercially reasonable rates to its customers at the Premises).

10.6 Fire Safety. Tenant shall use every reasonable precaution against fire.

10.7 Sanitation. Tenant shall promptly remove all dirt, rubbish and refuse matter from the Premises and keep the same clean at all times to the satisfaction of Landlord, the Commonwealth of Pennsylvania and other governmental agencies having jurisdiction.

10.8 Explosives. Tenant shall not discharge, load or store, nor permit the discharging, loading or storage of explosive materials of any kind upon the Premises, or vessels, railroad cars, trucks or other vehicles moored to or upon the Premises except as permitted in writing by Landlord or the City of Philadelphia's regulation of March 30, 1983, as heretofore or hereafter amended, supplemented or replaced (attached as Exhibit "C"), any such discharge, loading or storage being hereby specifically prohibited.

10.9 Snow and Ice. Tenant shall promptly remove accumulations of snow from the Premises and, to the extent practical and in accordance with the responsibilities of Tenant hereunder, keep all roofs, eave boxes and deck drains free from any obstruction.

10.10 Security. Tenant shall at all times provide adequate security for the entire Premises, satisfactory to Landlord in its reasonable discretion.

## **ARTICLE XI**

### **DAMAGE TO THE DEMISED PREMISES**

#### **11.1 Damage and Destruction.**

11.1.1 Repairs. In the event that the Premises or any part thereof is damaged or destroyed by fire or other casualty, provided that Tenant is not in default of this Agreement and that no event, occurrence, action or inaction has occurred and is continuing, which with the passage of time or giving of notice, or both, would render Tenant in default of this Agreement, Landlord shall, subject to its rights under this Section 11.1, promptly and diligently restore, rebuild and repair the Wharf Structure (defined in Section 6.2) to the extent of available

insurance proceeds, as nearly as practicable to the condition existing immediately prior to such casualty, and Tenant shall promptly and diligently restore, rebuild and repair all improvements and/or Trade Fixtures upon the Wharf Structure contained within the Premises which existed prior to the casualty, as nearly as practicable to the condition existing immediately prior to such casualty. Tenant shall make available to Landlord all insurance proceeds, together with the amount of any deductible under Tenant's policy or policies of all risk, fire and casualty insurance maintained with respect to the Premises, which Landlord shall apply to payment of the costs of restoring, rebuilding and repairing the Wharf Structure as required hereunder. Landlord shall not be obligated to expend any sums in excess such insurance proceeds on account of Landlord's restoration obligations hereunder.

11.1.2 Demolition. In the event any portion of the Premises or Wharf Structure is damaged or destroyed and Landlord, pursuant to this Section, elects not to restore, rebuild or repair such portion of the Premises or Wharf Structure, then Tenant may elect to undertake the restoration, rebuilding or repairing of such portion of the Premises or Wharf Structure at Tenant's sole expense (utilizing all proceeds of Tenant's property insurance payable on account of such casualty, as well such other funds of Tenant's as shall be necessary to complete such work), subject to Landlord's prior approval of all plans and specifications relating to such work and such other reasonable conditions respecting construction as Landlord shall reasonably stipulate. Should Tenant not elect to undertake reconstruction as aforesaid, then Landlord (utilizing solely the insurance proceeds and deductible amounts provided by Tenant pursuant to Section 11.1.1 hereof) shall raze or otherwise make secure such portion of the Premises.

11.1.3 Base Rent Abatement. Tenant shall be entitled to an equitable reduction of the Base Rent during any period in which the Premises or any portion thereof is not usable by

Tenant due to damage or destruction caused by a fire or casualty for which Tenant does not have any liability, to the extent such inability to use that portion of the Premises substantially hinders Tenant's ability to handle cargo at the Premises; provided, however, that such reduction of Base Rent shall in no event continue for more than sixty (60) days following Landlord's completion of restoration of the Wharf Structure.

11.1.4 No Consequential Damages. No damages, compensation or claim of any kind shall be payable to Tenant by the Landlord for inconvenience, loss of business or annoyance arising from any repair or restoration of any portion of the Premises following a casualty. Subject to the other provisions of this Article XI, Landlord shall use all reasonable efforts to effect repair or restoration undertaken pursuant to this Article XI promptly and in such manner as not unreasonably to interfere with the Tenant's use, occupancy and security.

11.1.5. Tenant's Duty to Insure. Landlord will not carry insurance of any kind on the Tenant's personal property or on any alterations or improvements constructed at the Premises by Tenant and Tenant's Trade Fixtures, and, except as otherwise specifically required by law or this Agreement, shall not be obligated to repair any damage thereto or replace the same.

11.1.6 Limitation. Notwithstanding anything to the contrary contained in this Article XI, in the event that damage shall involve the Wharf Structure generally and shall be so extensive that Landlord shall decide not to repair or rebuild the Wharf Structure, or if available insurance proceeds are insufficient to repair or rebuild the damage, or if the casualty shall not be of a type insured against under standard all risk policies with extended type coverage, this Agreement shall at the option of Landlord, exercisable by written notice to Tenant given within ninety (90) days after Landlord is notified of the extent of the casualty, be terminated as of a date specified in such notice (which shall not be more than sixty (60) days thereafter) and the Base

Rent (taking into account any abatement as aforesaid) shall be adjusted proportionately as of the termination date and Tenant shall thereupon promptly vacate the Premises.

## **ARTICLE XII**

### **WAIVER**

12.1 Waivers. No waiver by either party at any time of any of the terms, conditions, covenants or agreements of this Agreement shall be deemed or taken as a waiver at any time thereafter of the same or any other term, condition, covenant or agreement herein contained, or the strict and prompt performance thereof by the proper party.

## **ARTICLE XIII**

### **MECHANIC'S LIENS**

13.1 Mechanic's Liens. Tenant will not permit, and will promptly discharge, at its cost and expense, all liens and charges upon the Premises or a part hereof arising by reason of any labor or materials furnished or claimed to have been furnished to or on behalf of Tenant, its agents, sublessees, licensees, assigns, permittees, employees or independent contractors or by reason of any construction, alteration, addition, repair or demolition of any part of the Premises (by or on behalf of Tenant, its agents, sublessees, licensees, assignees, permittees, employees or independent contractors). Landlord shall have, and is hereby given authority to enter upon the Premises at any reasonable time to post notices in a reasonable manner and at reasonable places which in its option shall be necessary to hold Landlord harmless from any claim or liability arising out of any work done on the Premises. Notice is hereby given that Landlord will not be liable for any labor, services or materials furnished or to be furnished by or for Tenant, or to anyone holding the Premises through or under Tenant, and that no mechanic's or other such lien



for any such labor or materials shall attach to or affect the interest of Landlord in and to the Premises.

## **ARTICLE XIV**

### **EMPLOYMENT PRACTICES**

14.1 Employment Practices. During the Term, Tenant hereby agrees to fully comply with the provisions of Employment Practices as set forth in Exhibit “D” attached hereto and made a part hereof.

## **ARTICLE XV**

### **REMEDIES**

15.1 Landlord’s Remedies. If Tenant fails to pay in full when due any installment of Rent or any other charge, expense, cost or payment to be paid by Tenant under this Agreement, including, without limitation, any Impositions, or otherwise fails to perform, violates or otherwise breaches any material covenant, condition or warranty of Tenant in this Agreement, and such failure, violation or breach is not cured within the applicable cure period, if any, set forth in this Article XV below, then Tenant shall be in default hereunder (an “Event of Default”) and;

15.1.1 The whole Rent for the whole Term, or at Landlord’s option any portion of the Term, together with all costs, officers commissions and watchmen’s wages, shall at Landlord’s option be taken to be due and payable forthwith and in arrears as if by the terms of this Agreement it or they were all payable in advance, with the right on the part of Landlord to take such action under the provisions of this Agreement as is provided for when Rent is in arrears and unpaid, and the unpaid balance of the whole Rent for the Term shall be first payout of the proceeds realized under any assignment, receivership, or under any sheriff’s or marshall’s

sale, or sale under proceedings in bankruptcy, insolvency or like proceedings, or under any other compulsory procedure or order of court, any law, usage or custom to the contrary notwithstanding.

***15.1.2 Upon default, Tenant hereby empowers any clerk or prothonotary or attorney to appear for Tenant without liability to Tenant in any competent court and there to confess judgment against Tenant as of any term, past, present or future, for all arrears of rent and rent as if in arrears, and for costs, expenses and other payments to be paid by Tenant under this Lease, together with an attorney's commission of five percent (5%) of the aggregate of such sums, for which this Agreement or a copy hereof shall be a sufficient warrant. Such authority shall not be exhausted by one exercise thereof, but judgment may be confessed as aforesaid and damages assessed thereunder from time to time, as often as any of the said Rent and other charges reserved as Rent shall fall due or be in arrears, and such powers may be exercised as well after the expiration of the Term.***

15.1.3 This Agreement and the Term hereby created, shall at the option of Landlord terminate and become absolutely void without any right on the part of Tenant to save the forfeiture by payment of Rent due, or by other performance of the condition violated. When the Agreement shall be so determined and also, when and as soon as the Term hereby created shall have expired, ***it shall be lawful for any attorney, as attorney for Tenant, to confess judgment in ejectment in any competent court, without liability to Tenant and without any stay of execution or appeal, against Tenant and all persons claiming under Tenant for the recovery by Landlord of possession of the Premises, for which this Agreement or a copy hereof shall be a sufficient warrant, whereupon, if Landlord so desires, a writ of possession may issue forthwith without any prior writ or proceedings whatsoever. And, if for any reason after such***

*action has been commenced, the same shall be discontinued and possession of the Premises remain in or be restored to Tenant, Landlord shall have the right upon any subsequent defaults to confess judgment in ejectment one or more further times in the manner and form as hereinbefore set forth, to recover possession of the Premises for such subsequent default. No such termination of this Agreement for recovering possession of the Premises shall deprive Landlord of any remedies or action against Tenant for all arrears of Rent or for damages for the breach of any covenant herein contained, nor shall the bringing of any such action for Rent, or breach of covenant, nor the resort to any other remedy herein provided for the recovery of Rent and of other monies due hereunder or for damages for breach of covenant be construed as a waiver of the right to insist upon the forfeiture and to obtain possession in the manner herein provided.*

15.1.4 L andlord may, at its option, relet the Premises as agent of Tenant for the balance of the Term of this Agreement and receive the Rent therefore and apply the same to the payment of any Rent or damages for breach of covenant due by lessee to Landlord under the terms hereof.

15.1.5 L andlord may, itself or by agent, without notice, enter upon the Premises, either by force or otherwise, and eject and expel Tenant and all others therefrom, any law, usage or custom to the contrary notwithstanding, without being liable to any prosecution or action therefore, the consent of Tenant being hereby given to Landlord and to any officer or agent of Landlord holding a warrant of distress or writ of execution issued by Landlord against Tenant to break or otherwise open all locked doors or windows, for the purpose of such entry, and upon such entry Tenant and any officer or agent of Landlord holding such a warrant of distress or writ of execution may distrain and levy upon any goods therein found.

15.1.6 In addition to the foregoing remedies, Landlord cumulatively shall have all available rights, remedies, power and privileges afforded from time to time by law or in equity.

15.1.7 In the event of any failure, violation or breach of covenant by Tenant, Landlord shall, except as provided in the following sentence, give written notice thereof to Tenant, and Tenant shall have a period of ten (10) days after receipt of such written notice to cure any monetary breach, including but not limited to replenishment or replacement of the Deposit, and Tenant shall have a period of thirty (30) days after receipt of such written notice to cure any other such failure, violation or breach. Landlord agrees that it will not exercise any remedy for default or breach hereunder, including applying any portion of the Deposit in respect thereof, if within the appropriate period Tenant (i) cures the default or breach with respect to the nonpayment of Rent or failure to replenish or replace the Deposit, (ii) with respect to defaults or breaches other than the nonpayment of Rent and the failure to replenish or replace the Deposit, commences action in good faith within ten (10) days to cure the default or breach of covenant and proceeds to effect and complete a cure within thirty (30) days (unless Landlord in its reasonable judgment determines that more than thirty (30) days is required to effect a cure, in which case the cure period shall be extended accordingly); provided, however, that Landlord shall not be required to provide any notice or cure period for a monetary default or breach more than two (2) times in any twelve (12) month period.

15.1.8 In connection with Landlord's exercise of any power conferred under this Agreement, either by the entry of an appearance, or by the entry of judgment by confession, Tenant (a) waives any procedural errors relating to or arising out of such exercise, and (b) agrees that if a true and correct copy of this Agreement be filed in such proceeding, it shall not be

necessary to file the original as a warrant of attorney, any law or rule of court to the contrary notwithstanding.

15.1.9 Any power herein given to appear for and confess and enter judgment against Tenant shall be exercisable any number of times and shall not, under any circumstances, be exhausted by one or more uses thereof. Such power may be exercisable by any assignee of Landlord and may be exercised against any permitted assignee of Tenant.

15.1.10 Tenant hereby waives, to the extent such right may be applicable, the right to three (3) months and fifteen (15) days notice required under certain circumstances by the Pennsylvania Landlord and Tenant Act of 1951, as amended or replaced, and the benefit of all laws now or hereafter in force with respect to notices to be provided under this Agreement and hereby agrees that the respective notice periods, if any, provided for in this Agreement shall be sufficient in any such case.

15.2 Remedies Cumulative. All of the remedies herein given to Landlord and all rights and remedies given to it by law or in equity, shall be cumulative and concurrent. No termination of this Agreement or the taking or recovery of the Premises shall deprive Landlord of any of its remedies or actions against Tenant for all arrearages of Rent or for damages, or for the breach of any covenant herein contained, nor shall the bringing of any action for arrears of Rent or breach of covenant, or the resort to any other remedy herein provided for recovery of arrears of Rent be construed as a waiver of the right to obtain possession of the Premises.

## **ARTICLE XVI**

### **SIGNS**

16.1 Signs. Tenant shall not place a sign on or about the Premises or any building or structure located thereon without the prior written consent of Landlord. Landlord reserves the

exclusive right to place signs at the Premises. Tenant agrees to remove promptly and to the satisfaction of Landlord, at the cost and expense of Tenant, upon the expiration of the Term or the earlier termination of this Agreement, any and all signs and placards placed by it upon the Premises, and to repair all damage caused by such removal or the initial installation of such sign.

## **ARTICLE XVII**

### **REPRESENTATIONS AND WARRANTIES OF TENANT**

17.1 Authorization. Tenant and the individual signing below on Tenant's behalf hereby represent and warrant to Landlord that Tenant has the requisite power and authority to make and perform its obligations under this Agreement, and that the execution of this Agreement has been duly authorized by all requisite corporation action.

17.2 Non-Conflict. Tenant hereby represents and warrants to Landlord that the execution, delivery and performance of this Agreement will not violate any provision of, nor conflict with, nor result in a breach of, any of the terms, conditions, or provisions of, nor constitute a default under, any agreement, indenture or instrument to which Tenant is a party.

## **ARTICLE XVIII**

### **MISCELLANEOUS**

18.1 Notices. Any notice permitted or required to be sent hereunder by either party to the other party shall be in writing, and shall be deemed to have been given when served in person on the addressee against a signed receipt, or sent by certified mail, return receipt requested, or by commercial overnight delivery services, postage prepaid, addressed as follows:

If to Landlord:

Philadelphia Regional Port Authority  
3460 N. Delaware Avenue, 2<sup>nd</sup> Floor  
Philadelphia, PA 19134  
Attention: James T. McDermott, Jr., Esquire

Executive Director

With a copy to:

Philadelphia Regional Port Authority  
3460 N. Delaware Avenue, 2<sup>nd</sup> Floor  
Philadelphia, PA 19134  
Attention: Gregory V. Iannarelli, Esquire  
Chief Counsel

If to Tenant:

Kinder Morgan Liquid Terminals LLC  
3300 North Delaware Avenue  
Philadelphia, PA 19134  
Attention: Director of Operations

With a copy to:

Kinder Morgan Terminals  
500 Dallas, Suite 1000  
Houston, TX 77002  
Attention: Vice President and General Counsel

or at such other place and to such other persons as the parties hereto may from time to time designate. Notices may be given on behalf of either party by such party's counsel.

18.2 Applicable Law. This Agreement shall be governed by and construed in accordance with the laws of the Commonwealth which are applicable to agreements made and to be performed wholly within the Commonwealth. All claims, disputes and other matters in question between the parties to this Agreement arising out of or relating to this Agreement or the breach hereof, shall be decided by arbitration before the Board of Claims created by Pa. Stat. Ann. tit. 72, § 4651-1 et seq., in the manner and under the terms and conditions provided therein. If the total amount in controversy does not amount to three hundred dollars (\$300.00) or more, or if, for any reason, the Board of Claims cannot exert jurisdiction over the matter, the matter shall

be referred to and decided by a panel consisting of the Executive Director of the Authority and the Director of Real Estate and Insurance of the Authority or their respective deputy or deputies.

Should any provision of this Agreement require judicial interpretation, it is agreed that the court interpreting or considering same shall not apply the presumption that the terms hereof shall be more strictly construed against a party by reason of the rule or conclusion that a document should be construed more strictly against the party who itself or through its agent prepared same. It is agreed and stipulated that all parties hereto have participated equally in the preparation of this Agreement.

18.3 Gender and Number. All terms and words used in this Agreement, regardless of the number and gender in which they are used, shall be deemed and construed to include any other number, singular or plural, and any other gender, masculine, feminine or neuter, as the context or sense of this Agreement or any Section or clause hereof may require, as if such words had been fully and properly written in such number and gender.

18.4 Captions. The captions and table of contents in this Agreement are inserted only as a matter of convenience and for ease of reference and in no way define, limit, enlarge or describe the scope or intent of this Agreement nor shall they in any way affect this Agreement or the construction of any provision hereof.

18.5 Counterparts. This Agreement may be executed in any number of identical counterparts, each of which when so executed and delivered shall be deemed an original, but all such counterparts together shall constitute one and the same instrument.

18.6 The Tenant's Successors and Assigns. The covenants, conditions and agreements in this Agreement shall bind and inure to the benefit of the Tenant, and, except as otherwise expressly provided in this Agreement, its legal representatives, heirs, successors and assigns.



18.7 The Landlord's Successors and Assigns; Limitation of Liability. The term "Landlord" as used in this Agreement means the fee owner of the Premises from time to time or, if different, the party from time to time holding and exercising the right as against all others to possession of the Premises. Landlord represents that it is the holder of such right as of the date hereof. In the event of the voluntary or involuntary transfer of such ownership or right to a successor-in-interest of Landlord, Landlord shall be discharged and relieved of all liability and obligations hereunder which shall thereafter accrue and Tenant shall look solely to such successor-in-interest for the performance of the covenants and obligations of Landlord hereunder which shall thereafter accrue. The liability of Landlord and its successors-in-interest under or with respect to this Agreement, and of Landlord's directors, officers, shareholders or constituent partners, shall be strictly limited to and enforceable solely out of its or their interest in the Premises and shall not be enforceable out of any other assets, and Tenant shall cause the judgment index to be marked. Subject to the foregoing, the provisions hereof shall bind and inure to the benefit of the successors and assigns of Landlord.

18.8 Invalidity of Provisions. If any term or provision of this Agreement or the application thereof to any person or circumstances shall, to any extent, be invalid or unenforceable, the remainder of this Agreement, and the application of such term or provision to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected thereby, and each provision of this Agreement shall be valid and be enforced to the fullest extent permitted by law.

18.9 Not Joint Venture. Nothing herein contained herein shall be deemed or construed by the parties hereto or by any third party as creating the relationship of (i) principal and agent, (ii) a partnership, or (iii) a joint venture between the parties hereto, if being understood and

agreed that neither any provisions contained herein nor any acts of the parties hereto shall be deemed to create any relationship to the parties hereto other than the relationship of Landlord and Tenant.

18.10 Exhibits. All exhibits attached to this Agreement are incorporated herein by this reference and made a part hereof as if fully set forth in this Agreement; provided, however, in the event that at the time of the execution of this Agreement any of the exhibits attached hereto are incomplete, the parties shall use their best efforts to complete such exhibits at the earliest possible date.

18.11 No Recordation. This Agreement shall not be recorded in the public records in whole or in memorandum form by either party hereto without the prior written consent of the other.

18.12 Time of Essence. Time is of the essence of this Agreement.

18.13 Business Interruption. Landlord shall not be liable for damages by reason of any inconvenience or interruption to the business of Tenant arising from any taking under the power of eminent domain, any loss or damage to or destruction of the Premises by fire, casualty or other cause whatsoever, or from the making of additions, alterations or repairs to the Premises.

18.14 Entire Agreement. This Agreement sets for all the promises, agreements, conditions and understandings between Landlord and Tenant relative to the Premises, and that there are no promises, agreements, conditions or understandings either oral or written, between them other than as are herein set forth. Except as otherwise provided herein, no subsequent alteration, amendment, change or addition to this Agreement shall be binding upon Landlord and Tenant unless made in writing and signed by both parties hereto.

18.15 Liability of the Commonwealth of Pennsylvania. This Agreement is not an obligation of the Commonwealth or any political subdivision thereof, other than Landlord, nor shall the Commonwealth or any political subdivision thereof, other than Landlord, be liable for any of the obligations under this Agreement. Nothing contained in this Agreement shall be deemed to pledge the general credit or taxing power of the Commonwealth or any political subdivision thereof.

18.16 Marketing. Tenant shall market its services offered at the Premises and the Premises itself in a professional, first class manner at least equivalent to the marketing efforts of similar enterprises.

18.17 Publicity. Tenant and Landlord agree to cooperate with each other in advertising, promotion and marketing activities for the Premises and the Port of Philadelphia.

18.18 Statutory Authority. This Agreement is being entered into pursuant to the provisions of Section 11(c) of the Philadelphia Regional Port Authority Act, Act of July 10, 1989, P.L. 291, No. 1989-50, with approval of a majority of the members of the Board of the Authority.

18.19 Tenant Integrity Provisions. During the term of this Agreement, Tenant hereby agrees to fully comply with the Tenant Integrity Provisions set forth in Exhibit "E" attached hereto and hereby made a part hereof.

## **ARTICLE XIX**

### **LEASEHOLD MORTGAGE**

19.1 Subject to the terms of this Section 19, Tenant shall have the right to mortgage the leasehold interest created by this Agreement and to collaterally assign this Agreement to any leasehold mortgagee (each a "leasehold mortgage") upon such terms and conditions as Tenant

shall determine, and to enter into any extensions, modifications or agreements of any such leasehold mortgage. No such leasehold mortgage shall extend to Landlord's ownership interest in the Premises. Tenant shall give Landlord prior written notice of each leasehold mortgage together with a copy of the leasehold mortgage documents being entered into which effect an assignment or pledge of this Agreement. Tenant warrants and agrees that each leasehold mortgage executed by Tenant shall be consistent with the terms set for in Section 19.2 hereof, and that any leasehold mortgage which purports to grant the holder thereof rights broader than those set forth in Section 19.2 hereof shall not be enforceable against Tenant's leasehold interest under this Agreement.

19.2 If Tenant, its successors or assigns, shall mortgage the leasehold interest herein demised, then as long as any such leasehold mortgage shall remain unsatisfied of record, the following provisions shall apply, notwithstanding anything else to the contrary contained in this Agreement, and any pertinent paragraphs of this Agreement shall be deemed to be amended so as to provide as follows:

- (a) Except as set forth in Section 19.2(d) below, there shall be no cancellation, surrender or modification of this Agreement without the prior written consent of the leasehold mortgage.
- (b) Provided that Tenant shall have given to Landlord at least thirty (30) days prior written notice of the name and address of the holder of any leasehold mortgage, Landlord shall simultaneously send to such holder a copy of each notice sent to Tenant, in the same manner as other notices are required to be sent under Article XV of this Agreement.

(c) Upon the occurrence of an Event of Default hereunder, or upon Landlord's giving of notice that an event has occurred which will become an Event of Default if not timely cured as provided hereunder, the holder of any leasehold mortgage shall have the same cure rights as are provided to Tenant under Article XV of this Agreement, to be exercised, if at all, within the same time periods provided to Tenant thereunder, and Landlord shall accept performance by or at the instigation of the leasehold mortgage as if the same had been done by Tenant. Tenant hereby constitutes and appoints each holder of a leasehold mortgage Tenant's agent and attorney-in-fact with full power in Tenant's name, place and stead, and at Tenant's cost and expense, to enter upon the Premises and make repairs, remove any violations of law, statutes, ordinances, rules or regulations of governing authorities, and to otherwise to perform any of Tenant's obligations under this Agreement.

(d) While a leasehold mortgage remains unsatisfied of record, Landlord shall be entitled to terminate this Agreement pursuant to the specific rights contained in this Agreement (subject to notice and opportunity to cure under Article XV hereof, if applicable) without the prior written consent of any leasehold mortgagee, notwithstanding the agreement set forth in Section 19.2(a) above.

(e) Any payment to be made or action to be taken by a leasehold mortgagee hereunder as a prerequisite to obtaining a new lease or keeping this Agreement in effect shall be deemed properly to have been made or taken by a nominee of such leasehold mortgage.

(f) No holder of a leasehold mortgage shall become personally liable under the agreements, terms, covenants or conditions of this Agreement unless and until it becomes, and then only for as long as it remains, the owner of Tenant's leasehold estate hereunder. Any assignment of this Agreement by any holder of a leasehold mortgage who succeeds to Tenant's leasehold interest hereunder shall be undertaken strictly in accordance with the terms of Article IX of this Agreement. Upon any such assignment by a leasehold mortgagee, notwithstanding anything to the contrary contained in Article IX hereof, the assignor shall be relieved of any further liability which may accrue hereunder from and after the date of such assignment, provided that the assignee shall execute and deliver to Landlord the instrument of assumption required under Article IX hereof.

(g) Tenant shall give each leasehold mortgagee notice of any condemnation proceedings affecting the Premises. Landlord agrees that the leasehold mortgagee shall have the right to intervene and be made party or intervener. Tenant's interest in any award as provided in this Agreement, as well as in any casualty insurance proceeds to which Tenant is entitled following restoration of the Premises and the Wharf Structure in accordance with this Agreement, are hereby paid over, transferred and assigned by Tenant to its leasehold mortgagee to the extent of the balance of any principal, interest or other payments due or which thereafter accrue or become due to the leasehold mortgagee.

(h) Landlord agrees to enter into a nondisturbance agreement with the holder of any leasehold mortgage created by Tenant pursuant to this Article IXX, in

Landlord's commercially reasonable form, pursuant to which Landlord will agree that the lien of such holder's leasehold mortgage against the Tenant's leasehold interest created under this Agreement shall not be disturbed upon the occurrence of an Event of Default and Landlord's exercise of its remedies, so long as such holder shall attorn to Landlord and fulfill the performance of Tenant's obligations thereafter arising hereunder.

**SECTION 15.1 PROVIDES FOR THE CONFESSION OF JUDGMENT AGAINST TENANT FOR MONEY AND FOR EJECTMENT. IN CONNECTION THEREWITH, TENANT, KNOWINGLY, VOLUNTARILY, INTENTIONALLY AND UPON ADVISE OF SEPARATE COUNSEL, UNCONDITIONALLY WAIVES ANY AND ALL RIGHTS IT MAY HAVE TO PRIOR NOTICE AND AN OPPORTUNITY FOR HEARING UNDER THE RESPECTIVE CONSTITUTIONS AND LAWS OF THE UNITED STATES AND THE COMMONWEALTH OF PENNSYLVANIA, WITHOUT LIMITATION OF THE FOREGOING, TENANT HEREBY SPECIFICALLY WAIVES ALL RIGHTS TENANT HAS OR MAY HAVE TO NOTICE AND OPPORTUNITY FOR A HEARING PRIOR TO EXECUTION UPON ANY JUDGMENT CONFESSED AGAINST TENANT BY LANDLORD HEREUNDER.**

**TENANT (I) CERTIFIES THAT NO REPRESENTATIVE, AGENT OR ATTORNEY OF LANDLORD HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT LANDLORD WILL NOT SEEK TO EXERCISE OR ENFORCE ITS RIGHTS TO CONFESS JUDGMENT HEREUNDER, AND (II) ACKNOWLEDGES THAT THE EXECUTION OF THIS AGREEMENT BY LANDLORD HAS BEEN MATERIALLY INDUCED BY, AMONG OTHER THINGS, THE INCLUSION IN THIS AGREEMENT**

**OF SAID RIGHTS TO CONFESS JUDGMENT FOR EJECTMENT AGAINST  
TENANT. TENANT FURTHER ACKNOWLEDGES THAT IT HAS HAD THE  
OPPORTUNITY TO DISCUSS SAID PROVISIONS WITH TENANT'S INDEPENDENT  
LEGAL COUNSEL AND THAT THE MEANING AND EFFECT OF SUCH  
PROVISIONS HAVE BEEN FULLY EXPLAINED TO TENANT BY SUCH COUNSEL,  
AND AS EVIDENCE OF SUCH FACT AN AUTHORIZED OFFICER OF TENANT  
SIGNS HIS OR HER INITIALS I THE SPACE PROVIDED BELOW.**


  
(Initials)






IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed as of the day and year first above written.

**KINDER MORGAN LIQUIDS  
TERMINALS LLC**


By:   
Name: Jeff Benetany  
Title: President

**Approved as to Legality and  
Form:**

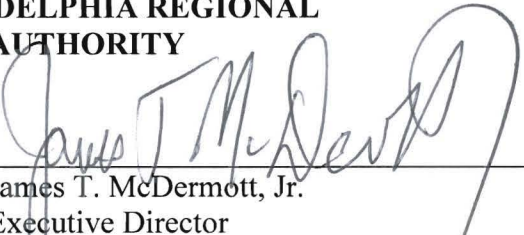
**PHILADELPHIA REGIONAL  
PORT AUTHORITY**

By:   
Name: Gregory V. Iannarelli, Esq.  
Title: Chief Counsel

**OFFICE OF THE ATTORNEY  
GENERAL**

By:   
Name: Robert A. Mulle, Esq.  
Title: Chief Deputy Attorney General

**PHILADELPHIA REGIONAL  
PORT AUTHORITY**

By:   
Name: James T. McDermott, Jr.  
Title: Executive Director

**Approved as to Fiscal Responsibility and  
Budgetary Appropriateness:**

**PHILADELPHIA REGIONAL  
PORT AUTHORITY**

By: Edward G. Henderson  
Name: Edward G. Henderson  
Title: Director of Finance & Capital Funding

**OFFICE OF THE BUDGET**

By: Joseph Lawruk  
Name: Joseph Lawruk  
Title: Comptroller